

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 24, 2006 Session

STATE OF TENNESSEE v. ISAIAH BURTON, JR.

**Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2995 Cheryl Blackburn, Judge**

No. M2005-00690-CCA-R3-CD - Filed July 7, 2006

Following a bench trial, Defendant, Isaiah Burton, Jr., was convicted of three counts of aggravated sexual battery and two counts of rape of a child. Defendant was sentenced to nine (9) years for each aggravated sexual battery conviction and twenty (20) years for each conviction for rape of a child. The sentence in Count 13 (rape of a child, twenty (20) years) was ordered to be served consecutively to the sentence in Count 18 (rape of a child, twenty (20) years). The sentences for the aggravated sexual battery conviction were structured to, in effect, run concurrently with the sentence for the rape of a child convictions, for a total effective sentence of forty (40) years. On appeal, Defendant argues (1) the evidence was insufficient to sustain the conviction of aggravated sexual battery under count two; (2) the evidence was insufficient to sustain the conviction of rape of a child under count thirteen; (3) the evidence was insufficient as to sustain the conviction of rape of a child under count eighteen; (4) the trial court erred in overruling Defendant's motion to suppress Defendant's statement; (5) the trial court erred in overruling Defendant's motion for a continuance filed on October 18, 2004; (6) the trial court erred by overruling Defendant's renewed motion for a continuance on October 25, 2004; (7) the trial court erred in overruling Defendant's motion for an independent psychological evaluation of the victims; and (8) the trial court erred in overruling Defendant's motion for judgment of acquittal with respect to the two rape of a child charges. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3, Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Charles E. Walker, Nashville, Tennessee (on appeal); Frank McLeod, Nashville, Tennessee (at trial), for the appellant, Isaiah Burton, Jr.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Bernard McEvoy, Assistant District Attorney General; and Diona Layden, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

During the 2002-2003 school year, Teresa Binkley McCain began working as principal at Cora Howe Elementary School in East Nashville. In her capacity as principal at Cora Howe, Ms. McCain met the victim, T.H., who attended the school. T.H. was in the fourth grade at the time and had attended Cora Howe since kindergarten. She was one of the older students at the school.

Ms. McCain described T.H. as a “needy child.” She explained that T.H. was neglected as far as her appearance was concerned. She would come to school dirty, smelling of a “smokey, musty kind of body odor,” wearing dirty clothes, with messy hair, and often infected with head lice. T.H. had been referred to the Department of Children’s Services (“DCS”) several times as well as the family resource center at Cora Howe Elementary.

Ms. McCain said that some of the female staff at the school did “special things” for T.H. Ms. McCain’s secretary, Vicky Kelly, had formed a relationship with T.H. prior to Ms. McCain becoming principal. Ms. Kelly had “always kind of helped [T.H.] with clean underwear, socks, made sure she had a jacket to wear, those kinds of things.” When Ms. McCain became principal, she continued with this assistance. Ms. McCain explained that T.H. would typically arrive late to school, having already missed breakfast in the cafeteria. She would eat breakfast from a “private stash” in the principal’s office and then she would get clothes for the day from a filing cabinet in the principal’s office. The clothes were especially for her and usually consisted of shirts, pants, underclothes, socks, and shoes.

T.H. was teased by other children for her bad clothes and odor. The office supplied her with clothes so that she could avoid the teasing and emotional abuse. The clothing came from the family resource center at Cora Howe. Ms. McCain kept the clothes in her office because on the occasions she allowed T.H. to wear the clothes home, T.H. never returned with them. T.H. wore her own clothes to and from school, but changed into the extra clothes once she arrived. She had several sets of clothes at school, and Ms. McCain washed the clothes so that they remained clean. A winter coat was also purchased for T.H. She wore the coat for a period of time, but it was Ms. McCain’s understanding that eventually T.H.’s older sister had begun wearing the coat.

Ms. McCain said that T.H. usually walked to school, but on occasion she would receive a ride from a family member or the man that lived across the street from her. Several staff members from Cora Howe made visits to T.H.’s home. On one occasion, Ms. McCain visited T.H.’s home while she was absent from school with head lice. Her purpose in going to the house was to advise T.H.’s mother about how to treat her daughter’s head lice because it was a recurring problem. She said that when she arrived at the home, T.H. came to the door with a “baby on her hip and a telephone in her hand.” T.H. explained that she was looking for a daycare to take the baby. She also told Ms. McCain that she had been cleaning all morning. Ms. McCain said she was surprised that a fourth grade child would be looking for a daycare. T.H.’s mother was asleep in the back bedroom.

It was Ms. McCain's impression that T.H.'s mother did not care and that any advice about the head lice "was landing on deaf ears."

T.H. was frequently absent as the school year continued. She returned to school in the end of March to take achievement tests. It was during this time that T.H. came to school crying and said that she and her mother had been in a fight. The following morning, she came to school upset again. This time she had a look of "shock" on her face and leaves in her hair. She explained to Ms. McCain that her mother was a "crackhead," and that she was doing drugs. She then showed Ms. McCain a place on her arm where her mother had bitten her. At this point, Ms. McCain contacted DCS. T.H. was immediately removed from her mother's home.

Ms. McCain said that when T.H. was in kindergarten, she had some hyperactivity issues and worked with a counselor from the Centerstone Mental Health Cooperative to remedy the problem. These problems were not present at the time Ms. McCain became principal, but T.H. was taking medicine and visiting a counselor bi-weekly.

Virginia Akers worked as a case manager at DCS for six years. On April 3, 2003, Ms. Akers investigated the victim's home for environmental neglect and physical abuse. She described the home as a single family dwelling with a main floor and a finished basement. The yard outside the home contained beer bottles and trash. The living room was a "wreck" and had "stuff piled up all over the place." The kitchen was "very, very dirty . . . There was a horrible smell in the house like it hadn't been cleaned in quite a while." There were also roaches all over the home. In the grandmother's room, there were approximately six quarts of beer lined up beside the bed, half of which were partially consumed and open. There was an eighteen-month-old child asleep in the grandmother's bed. There was also an open container of mothballs by the bed, fully accessible to the child. Throughout the home, there were ashtrays overflowing with cigarette butts.

The mother's room was in the basement. The stairs leading down to the basement were narrow and rickety. Ms. Akers did not recall the mother's room being especially dirty. The area where the victim and her sister stayed was also in the basement, in a small area behind the water heater. Ms. Akers said that the area resembled a "cave." She said the space was "pitch black" at two o'clock in the afternoon. There was a television in the area which served as the sole source of light. It was too dark for Ms. Akers to discern whether there were beds in the makeshift room.

Both the grandmother and the mother appeared intoxicated and smelled like alcohol. Ms. Akers said they appeared disheveled as if they had just awakened. There was also a man at the home who appeared sick or intoxicated. Ms. Akers was not able to determine the man's identity or his relationship to the girls. The adults were initially friendly, but their attitudes changed when Ms. Akers produced her camera to take pictures of the house. Ms. Akers eventually had to call the police so that she could take pictures and complete the investigation. T.H. and her sister were removed from the home. As cause for their removal, Ms. Akers cited the multiple referrals to DCS for environmental neglect, educational neglect, possible sexual and physical abuse, as well as the

mother's use of crack cocaine and history of prostitution. Ms. Akers never personally interviewed the children.

T.H. was eleven years old at the time of trial. She was living with her aunt and said that she enjoyed her new home because she was treated like a person. She described her previous home-life as "awful." She said that in that home, she lived with Gina, her sister, and her grandmother and grandfather. The victim called her mother "Gina" rather than "Mom" because she said she was not a mother and did not know how to take care of children except to abuse them and treat them poorly. She did not like living in the home because she was abused and "messed with." She was also dirty and other children from school made fun of her and beat her up because she did not have good clothes.

T.H. explained that she and her sister, B.L., lived in the basement of the home in the "heater room." Her mother also lived in the basement. She and her sister could see into their mother's room through a hole in their bedroom wall. T.H. said that she saw her mother doing "stuff with other men that married people should do." She said that her sister saw their mother engaged in fellatio, but she had never witnessed this act.

T.H. liked Cora Howe Elementary School because Ms. Kelly and Ms. McCain gave her nice clothes and took care of her. She was often late for school because she was scared to walk alone and waited for her sister to walk with her. It was during this walk to school that the other students made fun of her and hit her. There were no adults from her home who were awake in the morning to give she and her sister breakfast or walk them to school.

Neither T.H.'s mother nor her grandparents had a car that worked. Defendant, who T.H. identified as "Mr. Ike," had a truck and gave the family rides when necessary. When T.H. was in the first or second grade, Defendant began giving her and her sister rides to school and to the store. This continued until T.H. finished the fourth grade. Initially, Defendant took T.H. directly to school without stopping anywhere else. As time went on, Defendant began sexually abusing T.H. during these rides. T.H. said that when she was in the first grade, Defendant began touching her breasts. As she got older however, Defendant took things further, touching her vagina and forcing her to perform fellatio on him. According to T.H., most of this advanced touching occurred when she was in the fourth grade.

The first time T.H. witnessed Defendant touching her or her sister, B.L., Defendant was babysitting the girls at his house while their mother was at a bar. T.H. and her sister were watching television and Defendant "started sucking hickeys on [their] necks." T.H. explained that Defendant sucked on she and B.L.'s neck and in so doing left red marks on their necks. During this same incident, T.H. also saw Defendant touch her sister's breasts. The first time Defendant touched T.H.'s breasts, he was driving her to school. They were in the truck and he asked her to move closer to him on the seat. She did as she was told because she did not know that what was happening was bad. Defendant then put his hands under her shirt and began touching her breasts.

On another occasion, Defendant touched the victim's vagina with his hand. He told her to scoot closer to him in the truck and pull her pants down. This occurred while they were stopped at a stop sign on the way to school. Defendant put his fingers in T.H.'s vagina. She said that it hurt like being poked with a needle when he tried to penetrate her vagina with his fingers. On yet another occasion, Defendant took T.H. and B.L. to the store. On the way home from the store, B.L. was sitting on the truck bench between T.H. and Defendant. Using his hand, Defendant began touching the upper part of B.L.'s thigh through her clothes. During another truck ride to school, T.H. saw Defendant touching B.L.'s breasts. His hand was under her shirt and he was touching her skin. When they reached the school and got out of the truck, B.L. was upset and crying.

The last time that this abuse occurred, Defendant and T.H. were in his truck. He took her to a vacant lot near her house before taking her to school. He parked the car so that it was not visible from the road, then asked T.H. to move closer to him and lie down with her legs facing him. She did as he instructed and Defendant climbed on top of her and asked her to pull her pants down. Defendant unbuttoned his own pants. T.H. could see Defendant's penis when he unbuttoned his pants. Defendant touched the victim's vagina with his penis. He attempted to vaginally penetrate the victim with his penis. T.H. said that it hurt like a needle and she pushed Defendant away. She knew what was happening was wrong. Defendant instructed her not to tell anyone or he would kill her.

Defendant then forced the victim to perform fellatio on him. He put his hand on top of her head and forced her head toward his penis and his penis inside her mouth. Defendant pushed the victim's head up and down on his penis. She did as Defendant instructed because she was afraid he was going to kill her. Defendant was "moaning" while this was happening. Defendant did not ejaculate because the victim pushed him away with her hand and began putting her clothes back on. The victim then got out of the truck and went to school. This was the only occasion where Defendant forced T.H. to perform fellatio on him. She was scared but did not go home and tell her mother because her mother had bitten her arm earlier that day. T.H. and B.L. had previously told their mother what Defendant was doing to them and what was happening during their rides. Their mother did not do anything to protect the girls, nor did she report the abuse to the police. After this incident, however, T.H. reported the abuse to a secretary at school who then reported the abuse to DCS.

There were other adults who touched or attempted to touch T.H. and her sister. These were individuals who were hanging around her mother's house. T.H. told her mother that these people were abusing her and her sister, but her mother did nothing about it. T.H. also told some teachers at school, but when they went to the home to investigate, the individuals could not be located.

B.L. was twelve years old at the time of trial. She testified that Defendant had previously touched her in an inappropriate manner. She said that one instance of this touching occurred when Defendant was babysitting her and her sister. Defendant sucked on her neck and left a mark or a "hickey" on her neck. On another occasion, Defendant was cutting grass at church using a riding lawn mower. B.L. and her best friend were present and Defendant asked if they would like to ride

on the lawn mower with him. The girls took turns riding the lawn mower with Defendant. B.L.'s best friend went first and when she got off the lawn mower, she told B.L. that Defendant touched her. B.L. did not believe that Defendant would do that, but after she rode on the lawn mower with him, he touched her on both her inner and outer thigh, rubbing that area.

B.L. recalled another incident which happened while Defendant was taking B.L. and T.H. to the store. When they returned from the store, Defendant parked the car in the driveway and began touching B.L.'s breasts, under her clothing on her skin. B.L. said that at that time she wore a bra. B.L. told her sister to get out of the truck and they ran home. Other than the babysitting incident, B.L. never saw Defendant touch T.H. She said that through a hole in her bedroom wall, she witnessed her mother having sex with many men. She also saw her mother having oral sex, but she did not tell T.H. about what she saw.

Detective David Zoccola, with the Metro Nashville Police Department, was assigned to B.L. and T.H.'s case in June 2003. An interview with T.H. was conducted in Dickson County where she was staying after being removed from her mother's home. The information from the interview was then forwarded on to the Davidson County DCS. Detective Zoccola reviewed this information and conducted interviews at Cora Howe Elementary and with the victim's family before interviewing Defendant.

Detective Zoccola and Detective Cooley confronted Defendant at his residence. Defendant was weed-eating his yard when the detectives arrived. It was a hot day and Detective Zoccola asked Defendant to join him in the air-conditioned police car to answer a few questions about an ongoing investigation. The request was made in a calm manner without coercion. Defendant agreed and got in the passenger seat, Detective Zoccola sat in the driver's seat, and Detective Cooley sat in the backseat and tape-recorded the conversation. Detective Zoccola made it clear to Defendant that he was not in custody and he was free to leave the car at any time and that he did not have to answer any questions. Defendant acknowledged that he was free to leave.

Prior to interviewing Defendant, Detective Zoccola's understanding was that the girls knew Defendant because he was a neighbor and had frequently given the girls rides to the store or to school. He knew that the girls alleged that Defendant had sexually fondled and touched them, both together and individually, over an extended period of time. He was aware that one of the girls had alleged that this touching extended to penile/vaginal intercourse. Detective Zoccola based his interview on this information.

During this interview, Defendant acknowledged that he knew the girls and that he often gave them rides to the store or to school. He admitted to some improper behavior and touching that had gone on between him and the girls. Specifically, he admitted to fondling the girls' breasts and vaginal area, he admitted to skin to skin contact, and he admitted manipulating the situation so that the various kinds of contact were possible.

Defendant went on to explain that the girls always wanted to drive his truck or wanted him to teach them to drive, and that much of the fondling, particularly with T.H., occurred while the girls were sitting in his lap doing these things. He said that the touching occurred more than five times but less than ten times. Defendant denied penetrating either of the girls. When Detective Zoccola tried to question Defendant about taking T.H. to a vacant lot and attempting to have vaginal intercourse with her, Defendant denied that incident ever occurred and ended the interview by exiting the police car. The tape of the recorded conversation, as well as a transcribed document of the tape, were introduced into evidence at trial.

As stated above, Defendant was convicted of three counts of aggravated sexual battery and two counts of rape of a child. This appeal followed. The State argues that Defendant filed an untimely motion for new trial and that because the motion for new trial was not timely filed, all issues raised on appeal, with the exception of the sufficiency of the evidence, should be waived. Tennessee Rule of Appellate Procedure 3(e) provides in pertinent part:

An appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals shall be taken by timely filing a notice of appeal. . . . Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

A panel of this Court has previously held that pursuant to Rule 3(e) “the failure to file a motion for a new trial, the late filing of a motion for a new trial, and the failure to include an issue in a motion for a new trial results in waiver of all issues which, if found to be meritorious, would result in the granting of a new trial.” *State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) (footnote omitted). This waiver does not apply however, if the issue is found to be meritorious and would result in the dismissal of the prosecution against the accused. *State v. Keel*, 882 S.W.2d at 416 n.5 (citing *State v. Davis*, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987) (sufficiency of the indictment and evidence); *State v. Moore*, 713 S.W.2d 670, 673-74 (Tenn. Crim. App. 1985) (sufficiency of the evidence); *State v. Durham*, 614 S.W.2d 815, 816 n. 1 (Tenn. Crim. App. 1981) (sufficiency of the evidence). A motion for new trial “shall be made . . . within thirty days of the date the order of sentence is entered.” Tenn. R. Crim. P. 33(b). “Unlike the untimely filing of the notice of appeal, this Court does not have the authority to waive the untimely filing of a motion for new trial.” See Tenn. R. App. P. 4(a); *State v. Patterson*, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997).

In the present case, the trial court entered the judgments against Defendant on January 12, 2005. The thirty day time period in which to file a motion for new trial expired on February 11, 2005. Defendant filed his motion for new trial on February 14, 2005, after the time for filing had lapsed. Although generally this failure to timely file would render his motion a nullity, we conclude that a motion for new trial was not required in this instance. See *State v. Dodson*, 780 S.W.2d 778,

780 (Tenn. Crim. App. 1989). Our supreme court has previously held that “[b]y its terms, [the requirement of a motion for new trial] applies only to cases tried by a jury.” *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983); Tenn. R. App. P. 3(e). The court explained that “a party may request a trial judge in a non-jury matter to reconsider actions which the judge has taken, but this is not . . . a prerequisite to appellate review of those actions.” *Id.* at 807. Therefore, one of the exceptions to Rule 3(e) is that “a motion for new trial is not required in a non-jury trial.” David Louis Raybin, *Tennessee Criminal Practice and Procedure* § 33.62 (1985). Because Defendant’s trial was a bench trial, it was not required for him to file a motion for new trial pursuant to Rule 3(e) because it only applies to cases tried by a jury.

Pursuant to Tennessee Rule of Appellate Procedure 4(a), a notice of appeal shall be filed within thirty days after the date of entry of the judgment being appealed. Tenn. R. App. P. 4(a). The timely filing of certain motions, not applicable here, causes the thirty-day limitation to run from the time the order denying the motion(s) is entered. Tenn. R. App. P. 4(c). However, in all criminal cases, the notice of appeal is not jurisdictional and may be waived “in the interest of justice.” *State v. Davis*, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987). In the interest of justice, this Court waives the time requirement of Tennessee Rule of Appellate Procedure 4(a) and we will address all issues presented on the merits.

II. Variance Between Bill of Particulars and Proof at Trial

Although Defendant phrases his first issue as a challenge to the sufficiency of the evidence, he actually argues that there is a variance between the State’s bill of particulars and the evidence presented at trial in support of his conviction for count two, aggravated sexual battery. The bill of particulars states:

This offense occurred during the 2002-03 school year. Victim [B.L.] was in the fifth grade at Bailey Middle School. The defendant took victim [B.L.] and her half-sister, victim [T.H.], to a grocery store. He drove them to and from the store in his pick-up truck. [B.L.] sat in the middle, nearest the defendant. T.H. sat in the passenger seat, farthest from the defendant.

After returning from the store, the defendant pulled into the driveway of his home on Straightway Avenue. He touched [B.L.’s] breast with his hand. [B.L.] was not wearing a bra. The defendant touched her breast under clothing. [T.H.] witnessed this.

The relevant portion of B.L.’s testimony is as follows:

Q: Did [Defendant] ever touch other parts of your body?

A: He touched my breasts one time in his truck.

Q: I want you to tell me about that; again, from the beginning to the middle to the end.

A: Me and my sister got some money and we wanted a little bit more because we didn't enough [sic]. And we went and asked him if he [sic] could have some money to get something. He said, yeah, so he gave us some money.

And then we had no ride so we asked him for a ride. And we – he took us to the store. And when we got back, he parked the truck at his – in his driveway and he started touching my breasts. And he was in the driver's seat and I was in the middle. My sister was on the other side. And as soon as he started touching them I told my sister to get out and then we ran home.

Q: I've got a few questions about that. Do you remember what grade you were in when this was happening?

A: No, sir.

Q: Do you remember how old you were when this was happening?

A: No, sir.

Q: Do you know if that was about the time you were removed from your momma's home or was it a long time before?

A: It was – it was about the time I got taken away.

Q: Okay. You said that [Defendant] touched your breasts. Can you tell me at that time did you wear a bra?

A: Yes, sir.

Q: Did he touch you on top of your clothing or on your skin?

A: On my skin.

Q: And what part of his body did he touch you with?

A: With his hand.

Q: Can you tell me – I know that a shirt has a neck, has a bottom and a sleeve. How did he get his hand under your clothing and onto your skin?

A: He put his arm around my body and started rubbing my breasts.

Q: Did he touch one of your breasts or both of your breasts?

A: One.

Q: Did he say or do anything while he [sic] this happening [sic]?

A: No, Sir.

Q: And did you say or do anything?

A: I told him to stop.

Q: Did about [sic] [T.H.] see this happening?

A: Yes, sir.

The relevant portion of T.H.'s testimony is as follows:

Q: Okay. Can you tell me, did you ever see [Defendant] touch [B.L.]?

A: Yes, sir.

Q: I want you [sic] tell me about that. Where did it happen?

A: In his truck.

Q: Where were both you and [B.L.] in his truck?

A: Yes, sir.

Q: How come you two girls were in his truck?

A: Because he was taking is [sic] to the store.

Q: Okay. Tell me about the trip to the store.

A: On the way to our store he didn't do it. On the way to the store he didn't do nothing to my sister, but on the way back - -

Q: I'm sorry, [T.L.]. You're just talking a little too fast and a little too quiet.

A: Okay.

Q: Can you remember to use the mad voice?

A: Yes, sir.

Q: Okay. Can you tell me about the trip to the store? Loud.

A: Okay. When we was going to the store but he didn't touch her whenever we was – whenever we was on our way there, but he touched her when we was on our way back.

Q: Okay. Was the truck moving or was the truck parked?

A: It was moving.

Q: Okay. And where were you sitting?

A: I was sitting next to the door.

Q: Where was [B.L.] sitting?

A: In the center.

Q: Okay. And what part of [B.L.'s] body did he touch?

A: He touched her leg, like her thigh. . . .

Q: And what part of her thigh did he touch? What part of his body did he touch her thigh with?

A: With his hand.

Q: Okay. Did he touch her on the clothes or on the skin? . . .

A: On the clothes.

Q: Okay. Was there ever another time that you saw [Defendant] touch [B.L.]?

A: I saw him playing with her breasts.

Q: I'm sorry.

A: I saw him playing with her breasts.

Q: Was the truck going or was the truck parked?

A: It was going.

Q: Can you tell me about that from the beginning to the middle to the end?

A: He was just –he put – he put his hands under her shirt and played with her breast.

Q: And where was she sitting?

A: She was sitting next to him.

Q: And where were you sitting?

A: I was sitting by the door.

Q: Where were you on your way to?

A: We were on our way to school.

“A variance between an indictment or a subsequent bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial.” *State v. Shropshire*, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000) (citing *State v. Moss*, 662 S.W.2d 590, 592 (Tenn. 1984)). A variance is not material when substantial correspondence exists between the proof and the indictment. *Shropshire*, 45 S.W.3d at 71. Defendant takes issue with the fact that the bill of particulars indicates the victim was not wearing a bra, while the testimony at trial was that at the time the incident occurred the victim wore a bra. Defendant also argues that the testimony was inconsistent with respect to the location of the alleged offense. He does not question whether the touching actually occurred in the truck, only whether the truck was in transit or parked in Defendant’s driveway.

“Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim . . . [where] the victim is less than thirteen (13) years of age.” T.C.A. § 39-13-504(a)(4) (2003). “ ‘Sexual contact’ includes the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 39-13-501(6) (2003).

In light of the information provided in the bill of particulars and the statutory definitions of aggravated sexual battery and sexual contact, we conclude that Defendant was fully aware of the accusations against him, he was not misled in the preparation of his defense, and he was protected from another prosecution for the same offenses. There is no indication that Defendant's defense was in any way hindered by a variance in the proof regarding the location of the offense or the fact that the victim may have been wearing a bra during the incident. *See State v. Michael Thomason*, No. W1999-02000-CCA-R3-CD, 2000 WL 298695, at *7 (Tenn. Crim. App., at Jackson, Mar. 7, 2000) (no Tenn. R. App. P. 11 application filed); *see also State v. Philip Charles Saindon, Jr. and Jerry Sailors*, No. M2001-01860-CCA-R3-CD, 2003 WL 354508, at *7 (Tenn. Crim. App., at Nashville, Feb. 14, 2003), *perm. app denied* (Tenn. July 14, 2003). Furthermore, this court has long been "sensitive to the fact that young children who are victims of child abuse may not be able to testify that abuse occurred on a specific date, or provide extensive details in this regard." *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999). Defendant does not dispute that he touched the victim's breast. Nor was there any question that the victim was under the age of thirteen at the time of the offense. The trial court found this evidence sufficient to support a conviction for aggravated sexual battery. We agree. Defendant is not entitled to relief on this issue.

III. Sufficiency of the Evidence

Defendant's next two arguments concern the sufficiency of the evidence supporting his two convictions for rape of a child. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92, 61 L. Ed. 2d 560 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. *Liakas*, 199 Tenn. at 305, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *Id.*

Concerning the conviction for count thirteen, rape of a child, the conviction is based on an incident which occurred while T.H. was in the fourth grade. On this occasion, Defendant gave T.H. a ride to school. While stopped at a stop sign, Defendant told T.H. to move closer to him and pull her pants down. T.H. did as Defendant instructed, and Defendant proceeded to fondle her vagina. The victim testified that Defendant put his finger in her vagina, but she could not remember if it was one finger or more than one finger. She also testified that it hurt like a needle. Defendant concedes that T.H. testified that he put his finger in her vagina, but he points out that he testified at trial that these allegations were not true. As such, he argues the evidence is insufficient to support his conviction on this count.

Defendant also contends that the evidence was insufficient to support his conviction for count eighteen, rape of a child. The conviction for that charge is based on another incident wherein the Defendant was driving the victim to school. This incident also occurred during her fourth grade year. On the way to the victim's school, Defendant stopped his truck in a vacant lot located on the victim's street. The victim testified that Defendant pulled the car out of view of the street, and told her to lay down on the truck bench with her legs facing the driver's side of the car. Defendant then positioned himself on top of the victim and attempted to force his penis inside the victim. The victim testified that she told him to stop and moved away from him. She stated that the victim told her he would kill her if she told anyone, then he forced her to perform fellatio on him. The victim stated that Defendant held his hand on top of her head and forced her head up and down on his penis. She said that the victim was "moaning" while this was going on. In support of his argument that the evidence was insufficient to support his conviction, Defendant again points out that he testified at trial that the allegations made by the victim were not true.

"Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522(a) (2003). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or another intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." T.C.A. § 39-13-501(7).

With respect to both challenges to the sufficiency of the evidence, Defendant's arguments amount to a challenge to the trial court's credibility determinations. As previously stated, witness credibility is a matter left to the province of the trier of fact, in this case the trial court. With respect to count thirteen, the victim testified that Defendant penetrated her vagina with his finger. The trial court found this testimony credible. With respect to count eighteen, she further testified that Defendant forced her to perform fellatio on him. Both of these acts satisfy the elements of the crime of rape of a child. As such, we conclude that the evidence was sufficient for the trial court to find beyond a reasonable doubt that Defendant was guilty of rape of a child in each count. Defendant is not entitled to relief on this issue.

IV. Motion to Suppress

Defendant next argues that the trial court erred in failing to grant his motion to suppress his statements to police. Specifically, Defendant asserts that he was in police custody at the time the officers questioned him regarding his relationship with the victim, and that the officer failed to advise him of his *Miranda* rights prior to questioning in violation of the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. In support of his argument, Defendant points out that the interrogation took place in a police cruiser with two police officers, the questioning lasted approximately twenty-five minutes, the questioning concerned allegations that Defendant had sexually abused or raped a child, and the officers did not tell him until after he was inside the police cruiser that he was not required to answer their questions.

When reviewing the trial court's ruling regarding a pretrial motion to suppress, this Court may consider both the proof adduced at the suppression hearing and at trial. *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998). Our standard of review for a trial court's findings of fact and conclusions of law on a motion to suppress evidence is set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.* at 23. Questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trial court as the trier of fact. *Id.* As is customary, "the prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). Nevertheless, this Court reviews *de novo* the trial court's application of the law to the facts, without according any presumption of correctness to those conclusions. *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999).

The record on appeal contains the motion to suppress and the order denying the motion, along with the trial transcript, the transcript of the hearing on the motion for new trial, and the tape containing the recorded statements Defendant seeks to suppress. The transcript of the hearing on the motion to suppress is not included in the record. It is the duty of the accused to provide a record which conveys a fair, accurate, and complete account of what transpired with regard to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); *see State v. Taylor*, 992 S.W.2d 941, 944 (Tenn. 1999). The failure to prepare an adequate record for review of an issue results in a waiver of that issue. *Thompson v. State*, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). Nevertheless, we will address Defendant's issue as raised on appeal.

Both the United States and Tennessee Constitutions protect the accused from compelled self-incrimination. *See* U.S. Const. amend. V; Tenn. Const. art. I, § 9. As a result, government authorities are prohibited from using statements made by the accused during custodial interrogation unless the accused has been previously advised of his or her constitutional right against compulsory self incrimination and right to an attorney, and the accused knowingly and voluntarily waives those rights. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966).

Our supreme court has held that the relevant inquiry in determining if an individual is in custody and should have received a *Miranda* warning is whether “under the totality of the circumstances, . . . a reasonable person in the suspect’s position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.” *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996). This is an objective assessment and the court set forth a variety of factors for use in determining whether a reasonable person would consider himself or herself in custody. Those factors include “the time and location of the interrogation; the duration and character of the questioning; the officer’s tone of voice and general demeanor; the suspect’s method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect’s verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer’s suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.” *Anderson*, 937 S.W.2d at 855.

The proof showed that Detectives Zoccola and Cooley drove a police car to Defendant’s house to question him regarding allegations that he had sexually abused the victims. When they arrived at the residence, they found Defendant working in his yard. The officers approached Defendant and asked if he would be willing to answer questions pertaining to the allegations. Defendant agreed to answer the questions. The officers suggested conducting the interview in the police car due to the hot, summer temperatures, and Defendant agreed and walked with the officers to get in the car.

Once inside the car, Detective Zoccola informed Defendant that he was not in custody and not required to answer questions, and he could exit the car at any point during the questioning. Defendant acknowledged that he was free to leave and the questioning proceeded. When the officers asked if Defendant had taken T.H. to a vacant lot, Defendant denied that the incident ever occurred and ended the interview by exiting the car. Detective Cooley tape-recorded the entire interview and this tape was entered into evidence.

“After a review of the tape transcript and the testimony offered by the parties,” the trial court found that “based on an objective test the Defendant was never ‘taken into custody or otherwise deprived of his freedom of action in any significant way.’” The available record on appeal (the trial transcript) shows that Defendant willingly entered the car, answered the officer’s questions, and exited the car of his own volition when he was ready to do so. At no time was Defendant placed under any type of physical restraint or deprived of his freedom in any way. Indeed, the record reflects that he was permitted to leave the confines of the car at any time, he was aware of and understood this right, and he exercised this right by leaving the car when, after twenty-five minutes, he no longer wanted to answer the officer’s questions. Applying the above stated principles, and in light of the portion of the proceedings available on appeal, we conclude that the trial court properly found that Defendant was not in custody at the time of questioning. Therefore *Miranda* warnings

were not required, and the trial court did not err in denying Defendant's motion to suppress. Defendant is not entitled to relief on this issue.

V. Motion for a Continuance: October 18, 2004, Motion for a Continuance: October 25, 2004

Defendant next argues that the trial court erred in overruling both his motion and his renewed motion for a continuance in light of the State's supplemental discovery responses filed just prior to trial and containing "material and exculpatory evidence." Defendant asserts that the State filed supplemental discovery on the afternoon of October 22, 2004, and the defense did not receive the material until October 24, 2002, one day prior to trial. According to Defendant, the supplemental discovery contained twelve potential witnesses, three of whom were accused of physically and sexually abusing the victims. Defendant argues that the trial court's failure to grant a continuance violated Defendant's rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), which holds that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 373 U.S. at 87, 83 S. Ct. at 1196-97.

The granting of a continuance rests within the sound discretion of the trial court. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004). We will reverse based upon the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995). In order to show prejudice, the defendant must demonstrate that a different result might reasonably have been reached if the trial court had granted the continuance or that the denial of the continuance denied the defendant a fair trial. *Id.* Moreover, a defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice. *Odom*, 137 S.W.3d at 589. This Court has recognized that a continuance might be appropriate in order to afford a defendant a "reasonable opportunity" to locate a witness. *State v. Morgan*, 825 S.W.2d 113, 117-18 (Tenn. Crim. App. 1991). However, the burden rests with the defendant to show that a continuance might have reasonably resulted in locating the witness. *Id.*

After a thorough review of the record, we find nothing to indicate that Defendant was prejudiced by the trial court's denial of either of his motions for a continuance. Although Defendant asserts that there were twelve potential witnesses, three of whom were accused of physically and sexually abusing the victims, he offers no evidence to show what "material and exculpatory evidence" those witnesses would have offered. If obtaining these affidavits were impossible due to time constraints or otherwise, Defendant should have made an offer of proof as to why this exculpatory evidence could not be presented. We conclude that Defendant has not demonstrated to this Court that he suffered prejudice because the trial court did not continue the case. He is not entitled to relief on this issue.

VI. Motion for Independent Psychological Evaluation of the Victims

Defendant contends that the trial court erred in overruling his motion for an independent psychological evaluation of the victim. Defendant asserts that T.H. “reported other instances of sexual abuse with multiple abusers, was diagnosed with Attention Deficit Hyperactivity Disorder, had discontinued her medications, and was hearing voices that wanted her to kill her teacher and herself.” Defendant cites his own motion in support of these facts and argues that in light of this information, it was an abuse of discretion for the trial court to deny his motion. The State counters that the issue is without merit because Defendant has “failed to set forth compelling reasons for ordering the victims to submit to a psychological examination,” and therefore has not shown that the trial court abused its discretion.

Our supreme court has stated that the analysis to be followed by a trial court in determining whether a defendant’s request for psychological testing should be granted is set forth in *Forbes v. State*, 559 S.W.2d 318, 321 (Tenn. 1977), which held that:

in any case involving a sex violation, the trial judge has the inherent power to compel a psychiatric or psychological examination of the victim, where such examination is necessary to insure a just and orderly disposition of the cause. Such power should be invoked only for the most compelling of reasons, all of which must be documented in the record. This discretion should be exercised sparingly.

Forbes, 559 S.W.2d at 321.

The requirement of a mental examination in a sexual abuse case could potentially compound the humiliation and trauma to the victim. *Forbes*, 559 S.W.2d at 320.

As previously stated by this court, “[t]he purpose of a court-ordered psychological examination of a complaining witness or victim is ‘to determine whether or not the emotional or mental condition of the witness may affect [the witnesses’] ability to tell the truth.’” *State v. Craig Allen Lewis*, No. 01C01-9307-CC-00232, 1995 WL 10509, *5 (Tenn. Crim. App., at Nashville, Jan. 12, 1995) (no Tenn. R. App. 11 application filed) (quoting *People v. Francis*, 5 Cal. App. 3d 414, 419, 85 Cal. Rptr. 61, 64 (1970)). A psychological examination should be conducted “only when it might yield relevant evidence of the existence of a substantial mental impairment.” *Lewis*, 1195 WL 10509 at *5 (citing *Newsome v. State*, 782 P.2d 689, 690 (Alaska Ct. App. 1989)).

Tennessee courts have detailed factors which trial courts must consider in determining whether to order examinations. In *State v. Ballard*, 714 S.W.2d 284, 287 (Tenn. Crim. App. 1986), this Court noted that victims of sex crimes may be required to submit to a psychological examination if:

1. substantial doubt is cast upon the victim's sanity;
2. there is a record of prior mental disorders or sexual fantasies;
3. the story is incredible;
4. the child has not been examined by competent experts who will testify at trial;
5. there is little or no corroboration to support the charge.

In *State v. Barone*, 852 S.W.2d 216, 222 (Tenn. 1993), the Tennessee Supreme Court identified the following non-exclusive factors as relevant to a determination of whether a victim should be subjected to a court-ordered physical examination:

1. [t]he complainant's age,
2. [t]he remoteness in time of the alleged incident to the proposed examination,
3. [t]he nature of the requested examination and the intrusiveness inherent in it,
4. [t]he resulting physical and emotional effects of the examination on the victim,
5. [t]he probative value of the examination to the issue before the court,
6. [t]he evidence already available for defendant's use.

Although the issue in *Barone* was a physical examination, this court later held that these factors were equally applicable to a defendant's request for a psychological or psychiatric examination. *State v. Edward H. Jones*, No. 03C01-9301-CR-00024, 1994 WL 529397, at *9 -10 (Tenn. Crim. App., at Knoxville, Sept. 15, 1994) (no Tenn. R. App. P. 11 application filed). We explained that "[a] trial court must strike a delicate balance between the emotional trauma, potential harassment, and intimidation of the victim and 'the likelihood of the examination producing substantial material evidence that will be beneficial to the defendant's case.'" *Id.* at *10 (citing *State v. Barone*, 852 S.W.2d at 222). "The critical inquiry is whether the evidence sought by the defendant is of such importance to his defense that it outweighs the potential for harm caused by the invasion of the complainant's privacy, including the prospect that undergoing a physical examination might be used for the harassment of a prosecuting witness." *Id.*

After a thorough review of the record in light of the aforementioned case law, we are unable to conclude that the trial court abused its discretion in denying appellant's motion for a psychological evaluation of the victim. There was no evidence introduced at trial that would call the victim's sanity into question. Nor was there evidence to suggest the victim had an existing mental disorder which would cause the victim to fabricate the allegations against Defendant. The trial judge determined that she was competent to stand trial. The victim's testimony regarding the manner in which Defendant had sexually abused her was corroborated by that of Officer Zoccola. The proof showed that the victim had been subjected to questioning and had been required to tell the story on several occasions to several different people. The trial court properly found that the potential for harassing the victim and causing further emotional trauma was not outweighed by the possibility of eliciting evidence beneficial to Defendant's case. Defendant is not entitled to relief on this issue.

VII. Judgment of Acquittal

In his final issue on appeal, Defendant asserts that the trial court erred by refusing to grant a motion for judgment of acquittal as to the convictions for rape of a child based on the insufficiency of the evidence. He asserts that although the victim testified that Defendant vaginally penetrated her with his fingers and forced her to perform fellatio, Defendant denied these allegations and therefore the trial court should have granted his motion for judgment of acquittal. Rule 29 of the Tennessee Rules of Criminal Procedure provides, in relevant part, as follows:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

Tenn. R. Crim. P. 29(a).

This rule empowers the trial judge to direct a judgment of acquittal when the evidence is insufficient to warrant a conviction either at the time the state rests or at the conclusion of all the evidence. *Overturf v. State*, 571 S.W.2d 837, 839 (Tenn. 1978). At the point the motion is made, the trial court must favor the State with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence. *Hill v. State*, 4 Tenn. Crim. App. 325, 337, 470 S.W.2d 853, 858 (Tenn. Crim. App. 1971). The standard by which the trial court determines a motion for judgment of acquittal at that time is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Anderson*, 880 S.W.2d 720, 726 (Tenn. Crim. App. 1994). That is, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e). Applying these principles, we conclude that the trial court did not err when it determined that a judgment of acquittal was not proper as to the two charges of rape of a child because the evidence was sufficient to support the trial court's finding of rape of a child. Therefore, Defendant is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgments of the trial court are affirmed.

THOMAS T. WOODALL, JUDGE